LAW OF PERSONS

JACQUELINE HEATON*

SUBORDINATE LEGISLATION

In terms of the Child Justice Act 75 of 2008, a child who is

to incur criminal liability (ss 41(1) and 49(1)*(b)*). This diversion may only be to an accredited diversion programme and diversion service provider (s 56(1) read with the definition of 'diversion' in s 1). In September 2013, the Minister of Social Development published the names and details of entities that have been accredited to provide diversion programmes and diversion services in various provinces (GN 686 *GG* 36843 of 13 September 2013).

DRAFT LEGISLATION

The Judicial Matters Amendment Bill 7 of 2013 was tabled in Parliament during 2013. Clause 36 of the original version, and version B of this Amendment Bill, duplicate the amendment set out in clause 2 of the Judicial Matters Third Amendment Bill 53 of 2013. The duplicate amendments refine the evaluation of the criminal capacity of a minor by amending s 11(2)*(b)* of the Child Justice Act to require the inquiry magistrate or child justice court to consider the cognitive, moral, emotional, psychological and social development of the child. The Portfolio Committee on Justice and Constitutional Development (National Assembly) subsequently addressed the duplication by rejecting the proposed amendment effected by clause 36 of the Judicial Matters Amendment Bill 7B (see Judicial Matters Amendment Bill 7C). Therefore, only clause 2 of the Judicial Matters Third Amendment Bill now deals with this refinement of the evaluation of the criminal capacity of a minor.

* BLC LLB (UP) LLM (Unisa), Professor of Law in the Department of Private Law, University of South Africa. This material is based on work supported financially by the National Research Foundation. Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard thereto. This survey is partly based on contributions previously published in the 2013 *Juta Quarterly Review*.

In 2013, the Mental Health Care Amendment Bill 39 of 2012 was referred to the Select Committee on Social Services of the National Council of Provinces. The relatively minor amendments effected by the Select Committee have been incorporated in version 39B of the Amendment Bill. The Amendment Bill seeks to amend the Mental Health Care Act 17 of 2002 by inserting s 72A into the Act (cl 1 of the Amendment Bill). This section provides for delegation of powers by the Director-General of the national Department of Health to officials in the department in order to improve the application and effective implementation of the Act (cl 1 of the Amendment Bill read with para 1.1 of the Memorandum on Objects of Mental Health Care Amendment Bill, 2012, attached to version 39B of the Amendment Bill). The Amendment Bill further provides for the repeal of chapter 8 of the Mental Health Act 8 of 1973 (cl 2). Chapter 8 deals with hospital boards and is the only chapter of the Mental Health Act that is still in operation.

CASE LAW

Age of Majority

In *APDOL v Road Accident Fund* 2013 (2) SA 287 (GNP), the Road Accident Fund raised a special plea of prescription against the plaintiff's claim for damages for loss of support. The claim had arisen in 2004, when the plaintiff was sixteen years of age, but was lodged only on 25 August 2010, when the plaintiff was approximately 22 years and six months old. Prescription of a claim in terms of the Road Accident Fund Act 56 of 1996 usually takes place three years after the date on which the claim arises (s 23(1) of the Road Accident Fund Act). However, in the case of a claim by a minor, prescription only starts to run once the minor becomes a major (s 23(2)). Before s 17 of the Children's Act 38 of 2005 came into operation on 1 July 2007, s 1 of the Age of Majority Act 57 of 1972 set the age of majority at 21 years of age. While the latter Act applied, a minor had three years after turning 21 to institute an action against the Road Accident Fund. Section 313, read with Schedule 4 to the Children's Act, repealed the Age of Majority Act, and s 17 of the Children's Act lowered the age of majority to eighteen years of age. The Road Accident Fund argued that the lowering of the age of majority resulted in prescription running from the date of the coming into operation of

s 17 of the Children's Act, with the result that the claim had prescribed on 1 July 2010.

The court rejected this argument. Prinsloo J referred to s 12(2)*(c)* and *(e)* of the Interpretation Act 33 of 1957 (para [18]), which provides

> Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not —
> *(a)* revive anything not in force or existing at the time at which the repeal takes effect; or . . .
> *(e)* affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

He stated that these provisions, read with ss 28 and 39(2) of the Constitution of the Republic of South Africa, 1996, meant that the lowering of the age of majority did not affect any right a minor acquired before the Age of Majority Act was repealed and the age of majority lowered to eighteen years (paras [24], [33]). He held that a finding that the running of prescription of the plaintiff's claim had started on 1 July 2007 would not be in keeping with the injunction in s 39(2) of the Constitution that legislation must be interpreted in a way that promotes the spirit, purport and objects of the Bill of Rights, and the statement in s 28(2) of the Constitution that a child's best interests are of paramount importance in every matter concerning the child (para [26]). He further pointed out that no provision in the Children's Act indicates that the Act operates retroactively (para [25]). He accordingly dismissed the special plea (para [34]).

This finding is undoubtedly correct. Last year, in *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD) (see 2012 *Annual Survey* 704), the court was also confronted with the effect that the lowering of the age of majority has on the date on which extinctive prescription takes place. In that case, the plaintiff's claim arose because he had been assaulted by the deputy principal of the school he attended. The Road Accident Fund Act was consequently not in issue. Instead, the Prescription Act 68 of 1969 applied. The court held that if a person who was under the age of 21 years acquired a claim before 1 July 2007, the change in the person's status brought about by s 17 of the Children's Act did not affect the date on which extinctive prescription occurs. In

that case, too, the court pointed out that nothing in the Children's Act indicates that it operates with retroactive effect, and also relied on ss 28 and 39(2) of the Constitution.

Domicile

In *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (2 December 2013), the court had to decide a dispute relating to the division of the assets of a divorcing couple. The dispute turned on whether the spouses' matrimonial property system was determined by Mauritian or South African law. Because of the rule of South African Private International Law that the law of the husband's domicile at the time of the marriage determines the spouses' matrimonial property system (*Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A)), Mauritian law would apply if the husband were domiciled in Mauritius at the time of the wedding, while South African law would apply if he were domiciled in South Africa. In terms of Mauritian law, the spouses would be married out of community of property while, in terms of South African law, they would be married in community of property as they had not entered into an antenuptial contract (*Edelstein v Edelstein NO* 1952 (3) SA 1 (A)). (If the marriage were out of community of property, the wife might possibly have been entitled to redistribution of assets in terms of s 7(3)–(6) of the Divorce Act 70 of 1979. However, she abandoned this claim before the trial (para [9].) On redistribution of assets, and the conflicting decisions as to whether this remedy applies to foreign marriages, see CF Forsyth *Private International Law* 5 ed (2012) 307–11; Jacqueline Heaton *South African Family Law* 3 ed (2010) 133–6.)

The spouses were married in Mauritius in 1983 while both were living there. Before their marriage, the husband was offered employment at the SABC subject to his obtaining a South African residence permit. His application for a residence permit was successful and the spouses moved to South Africa a month after their wedding. They continued to live in South Africa until their divorce. The husband testified that he had always intended to return to Mauritius and that if his application for a residence permit had failed, he would have remained in Mauritius where he had received several offers of employment. The trial court found that the husband was domiciled in South Africa at the time of the marriage. This finding was overturned on appeal.

The Supreme Court of Appeal held that the husband was domiciled in Mauritius. First, the court found that it was highly unlikely that he would have formed the *animus* (intention) of permanently settling in South Africa before taking up employment in this country (para [8]). Secondly, he could not have established a domicile of choice in South Africa without having moved to this country as he could not have satisfied the *factum* requirement without having settled here (ibid). Consequently, he was still domiciled in Mauritius when the marriage was concluded, and the spouses' matrimonial property system was governed by Mauritian law.

The Supreme Court of Appeal was correct in finding that the husband did not meet the requirements for acquiring a domicile of choice in South Africa at the time of the spouses' marriage. What might be questioned is why the court arrived at this finding with reference only to the common law and failed to mention the Domicile Act 3 of 1992. The reason is that the Act came into operation on 1 August 1992 and is not retroactive (s 8(2)). As the spouses were married in 1983 and their matrimonial property system had to be determined with reference to that date, the Act did not apply to them.

For the sake of interest, the difference between the *animus* requirement for acquiring a domicile of choice in terms of the common law and under the Domicile Act is briefly mentioned. In *Eilon v Eilon* 1965 (1) SA 703 (A) 721A, the majority of the then Appellate Division held that the common-law *animus* requirement was met if the person 'had . . . a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice' and that '[a] contemplation of any *certain* or *foreseeable* future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains *any doubt* as to whether he will remain or not, intention to settle permanently is likewise excluded'. Section 1(2) of the Act, in contrast, simply requires that the person must have the intention to settle at a particular place for an indefinite period.

Finally, it should be noted that, although the rule as to the use of the husband's domicile for purposes of determining the spouses' matrimonial property system is probably unconstitutional, the Supreme Court of Appeal found it unnecessary to dwell on this issue as both spouses were domiciled in the same country (Mauritius) at the time of the marriage (para [10]). (On the unconstitutionality of the rule, see, for example, Forsyth *Private*

International Law 300–1; Jacqueline Heaton *The South African Law of Persons* 4 ed (2012) 40–1; JL Neels 'Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding' 1992 *TSAR* 336; Elsabe Schoeman 'The South African conflict rule for proprietary consequences of marriage: Learning from the German experience' 2004 *TSAR* 115, 117–18, 140.)

Minor's Contract

In *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA), the Supreme Court of Appeal removed any doubt there might have been as to the impermissibility of set-off of a debt a debtor owes to a minor against a debt the minor's guardian owes to the debtor. In this case, a mother and her two minor children were injured when a motor vehicle crashed into them while they were walking on or next to a road. Both children sustained head injuries, were hospitalised for some time and suffered from epileptic seizures after the incident. Damages were claimed from the Road Accident Fund for the injuries the mother and children sustained in the incident. The Fund offered a small amount of money in respect of the children's injuries. It further reduced the amount by 30 per cent as it found that the children's mother had 30 per cent contributory negligence in the incident. The children's mother accepted the offer. Ten years later, the respondent was appointed *curator ad litem* to represent the children in a civil action against the Fund. The respondent sought an order setting aside the settlement and claiming substantial damages for the children. The parties agreed that the issue of whether the settlement should be set aside had to be decided first.

In the High Court the respondent relied, in the alternative, on three causes of action for having the settlement set aside. The second cause — that the settlement was prejudicial to the interests of the two children — is the only one that is relevant for present purposes. This cause was accepted by the High Court which found in favour of the respondent and ordered the setting aside of the settlement. The appellant appealed to the Supreme Court of Appeal.

The only issue to be decided on appeal was whether the trial court's decision that the settlement be set aside because it prejudiced the interests of the minors was correct. Delivering the unanimous decision of the Supreme Court of Appeal, Leach JA pointed out that it is settled law that a minor's contract may be set aside by using *restitutio in integrum* if the contract was prejudicial

to the minor when it was concluded, and such prejudice was serious or substantial (para [12]). He indicated that even on the limited medical information available when the minors' claims were settled, it was clear that they had sustained head injuries that were not insubstantial and had required their hospitalisation (para [18]). Further, '[a]ny reasonable assessment of the children's damages should . . . have taken into account that there was a real possibility that they had developed post-traumatic epilepsy', but this had not been done (ibid). Consequently, wholly inadequate amounts had been offered and the settlement had failed to provide for the minors' future medical expenses (paras [19], [21]). Moreover, the amounts offered had been reduced by 30 per cent to cater for an apportionment against the minors' mother (para [22]). Leach JA stated that it was trite that set-off can only occur in the case of reciprocal indebtedness, and that 'individuals in their personal capacities are treated as different persons from when they act in representative capacities' (para [23]). Therefore, a debtor cannot set off a debt he or she owes to a minor against a debt that the minor's parent owes to the debtor (ibid).

Despite this position being trite, the Fund relied on Voet *Commentarias ad Pandectas* 16.2.8 to argue that it could set off any amount it could recover from the minors' mother in her personal capacity against the amount it owed to her in her capacity as the minors' natural guardian (para [24]). Leach JA quoted paragraph 16.2.8 from Johannes Voet *Commentarius ad Pandectas*, *Translated with Explanatory Notes and Notes of All South African Cases by Percival Gane Under the Title The Selective Voet Being the Commentary on the Pandects [Paris Editon of 1829] by Johannes Voet [1647–1713] and the Supplement to That Work by Johannes van der Linden [1756–1835]* (1956). This paragraph reads as follows (footnotes omitted)

> *(i) Guardian's claim against own debtor and debt of ward.* — Furthermore a guardian who sues against his own debtor in his own name is not held liable to suffer set-off of what his own ward owes to the opponent sued.
>
> *(ii) Guardian's claim for debt to ward and his own debt.* — Nor does what a guardian claims in the name of his wards from a debtor to the wards undergo set-off of what the guardian owes in his own personal name to such debtor of the wards.
>
> *(iii) Guardian's debt to creditor who is also in debt to ward.* — But if a guardian is sued in his own name by his own creditor who is likewise a debtor of the ward, the position is rather that set-off is

> allowed of that which the guardian owes against that which is owed to his own ward.

He pointed out that the Fund relied solely on paragraph *(iii)* as authority for its argument. He further pointed out that paragraph *(iii)* was inconsistent with paragraphs *(i)* and *(ii)*, and that paragraph *(iii)* 'flies in the face of the well-established general principles of set-off' set out above (para [25]). Referring to academic criticism of the principle Voet espouses in paragraph *(iii)* (paras [25]–[27]), Leach JA held that there was 'no reason in principle why the general rules of set-off, which exclude a debt owed by or to an individual in his personal capacity being set-off against a debt owed by or [to] that person in a representative capacity, should not operate in respect of claims brought by custodian parents on behalf of their minor children' (para [28]). He held that failing to apply the general rule could only disadvantage the minor. He proceeded

> While there do not appear to be any reported decisions advancing the contrary conclusion, I think the time has now come for this court to put the matter beyond doubt and to rule that a debtor liable to a minor child, when sued by the child's custodian parent, may not set off against its liability to the child any amount that it may personally be owed by the custodian parent (ibid).

He therefore concluded that the Fund was not allowed to reduce its liability to the minors by setting off the debt the minors' mother owed to it as a result of her contributory negligence, against the amount of such liability (para [29]). As the minors were clearly prejudiced by the set-off, the settlement agreement had to be set aside (paras [29], [31]). Leach JA accordingly dismissed the appeal (para [32]). The decision is correct.